telecommunications services more broadly, rather than focusing narrowly on impacts on isolated groups of users, such as customers of the LEC requesting the suspension or modification. Further, state commissions must weigh the overall impact on such users, including not only any adverse impacts on particular users, but whether there are other associated benefits of the regulatory requirements to telecommunications users. For example, the reduction in intercarrier compensation payments might lead some carriers to increase some rates, but also should reduce long distance rates, stimulate additional competition in local markets, consistent with the goals of the 1996 Act, and provide additional benefits to end users. We direct states to consider the totality of the circumstances in evaluating the impact on telecommunications users.

285. The second prong of section 251(f)(2)(A) requires a state commission to determine whether the LEC has demonstrated that the requested suspension or modification is necessary to "avoid imposing a requirement that is unduly economically burdensome."[753] The Eighth Circuit has interpreted the phase "unduly economically burdensome" to require a state to examine "the full economic burden on the ILEC."[754] Consistent with this interpretation, and our interpretation of section 251(f)(2)(A)(i) above, we conclude that states must evaluate the totality of the circumstances in evaluating the net burden. For example, in evaluating the impact of section 251(b)(5) as we interpret it today, states cannot simply look at the LEC's loss of intercarrier compensation revenues. Rather, the state must consider the full economic impact on the LEC of all the comprehensive reforms we adopt, including the ability of carriers to recover revenues by raising other rates, including the federal SLC, the potential economic savings due to reduced billing costs, fewer disputes and litigation regarding the classification of traffic, and the possibility that a carrier may receive universal service support if its financial integrity is threatened.

286. The third prong under section 251(f)(2)(A) requires a state commission to determine whether the LEC has demonstrated that compliance with section 251(b) or (c) may be "technically infeasible."[755] We do not believe that any carrier will be able to establish that implementation of our intercarrier compensation reforms is "technically infeasible," considering that carriers generally are exchanging and billing for traffic today, and our rules adopted in this order should merely simplify this process. Thus, we recommend that state commissions scrutinize rigorously any claims of technical infeasibility, particularly if the LEC is paying and/or receiving intercarrier compensation today.

287. Even if a state finds that a LEC satisfies the requirements for a temporary suspension or modification under section 251(f)(2)(A), section 251(f)(2)(B) provides that a state commission cannot grant a petition for suspension or modification unless it also finds that granting the requested petition is "consistent with the public interest, convenience, and necessity."[756] In light of the compelling need to adopt comprehensive reform of existing intercarrier compensation regimes as described above,[757] the Commission urges states to use caution and consider carefully the ramifications of granting any suspension or modification, particularly regarding petitions seeking relief from section 251(b)(5). Indeed, any suspension or modification that continues to treat traffic under different rate structures opens the door for continued regulatory arbitrage and disputes. Such action would undermine the tremendous public

[753] *See* 47 U.S.C. § 251(f)(2)(A)(ii).

[754] *Iowa Utils. II*, 219 F.3d at 761. The Commission initially interpreted undue economic burden to mean the "undue economic burden beyond the economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(d). The Eighth Circuit vacated this reading of the statute. *See Iowa Utils. II*, 219 F.3d at 760–61.

[755] 47 U.S.C. § 251(f)(2)(A)(iii).

[756] 47 U.S.C. § 251(f)(2)(B).

[757] *See supra* section V.A.3.

interest benefit associated with treating all traffic the same.

288. The Act is silent on what occurs if a state grants a suspension or modification of the section 251(b) or (c) obligations. We find that this silence creates ambiguities and could lead to inconsistent results following a modification or suspension under section 251(f)(2). We are concerned that a suspension or modification of section 251(b)(5) could result in exactly the kind of disparate treatment that we intend to correct with our actions today. Pursuant to our authority under section 201(b), as well as our authority to interpret section 251(f),[758] we therefore adopt rules specifically addressing certain of the implications of a suspension or modification of our intercarrier compensation rules.[759]

289. First, to minimize inconsistency and the possibility that the reforms we adopt today could be undermined, we extend our symmetry requirement for reciprocal compensation rates at the end of the transition period described in Part V.B to any suspension or modification of our section 251(b)(5) reciprocal compensation rules and requirements. If a LEC receives a suspension or modification of our reciprocal compensation pricing methodology, for example, all other LECs and CMRS providers that exchange traffic with the LEC receiving the suspension or modification will likewise be entitled to charge that LEC those same rates that the LEC charges them for the duration of such suspension or modification. We conclude that this symmetry requirement is in the public interest and will reduce disputes, arbitrage, and transaction costs. Indeed, a contrary result that would permit different terminating rates in the same geographic area would not be in the public interest and likely would lead to the same disputes we have today. If a state attempts to avoid this symmetry requirement by granting a LEC a suspension or modification of any section 251(b)(5) reciprocal compensation obligation and the state fails to require symmetric rates, we will invoke our authority under sections 201 and 332 of the Act to ensure that all carriers exchanging traffic with that LEC pay the same rate for terminating all traffic.

290. Second, if a state grants any suspension or modification that is more than 1 year in duration, we require the state to take a fresh look to determine whether such suspension/modification continues to satisfy the statutory test in light of possible changes in circumstances. To this end, 90 days before the 1-year anniversary of the grant of the suspension or modification, the LEC must file a petition demonstrating that the suspension or modification continues to satisfy the statutory criteria. In the intervening time, for example, a state may have rebalanced rates, the LEC may have increased its end-user charges, or other relevant changes may have occurred. Those actions may have obviated the need for the suspension or modification or, at a minimum, could result in the need for changes to the terms and duration of the suspension or modification. In such a review, the LEC continues to have the burden of demonstrating that the section 251(f)(2) criteria remain satisfied. We conclude that states should act upon such a fresh look within the 180 days for new petitions set forth in section 251(f)(2).[760]

[758] *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 385.

[759] Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b); *see also* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."). "[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'" *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 378. As the Supreme Court has confirmed, this grant of authority necessarily includes section 251(f). *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 385 (holding that the Commission has "jurisdiction to promulgate rules . . . regarding rural exemptions"); *see also id.* at 378 n.6 ("[T]he question in theses cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.").

[760] 47 U.S.C. § 251(f)(2) ("The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition.").

d. Existing Agreements

291. Below we discuss the effect of our intercarrier compensation reforms on certain types of existing agreements.

292. *Interconnection agreements.* With respect to interconnection agreements, we do not disturb the processes established by section 252 of the Act. As discussed above, the intercarrier compensation reforms we adopt will necessitate that states implement our new reciprocal compensation methodology. We expect that incumbent LECs and competing carriers will implement the reciprocal compensation changes as directed by section 252 of the Act.[761] We make clear that our actions today constitute a change in law, and we recognize that interconnection agreements may contain change of law provisions that allow for renegotiation and/or may contain some mechanism to resolve disputes about new agreement language implementing new rules.[762] Verizon raises a concern regarding the impact on contracts in "evergreen" status, which Verizon describes as "contracts that have reached the end of their terms but remain in effect pending entry into new contracts."[763] Given that the comprehensive reforms today are necessary to eliminate arbitrage and reduce disputes, we believe it is appropriate for carriers to take a "fresh look" at their interconnection agreements in "evergreen" status, including agreements that lack a change-of-law provision, and follow the section 252 process of negotiation and arbitration. We also note that, pursuant to section 251(a)(1), carriers remain free to negotiate alternative arrangements.[764]

293. *Commercial arrangements.* As discussed above, the intercarrier compensation reforms will require carriers to make certain changes to their tariffs relating to carrier-to-carrier charges, and potentially also SLCs. We do not, however, abrogate existing contracts or otherwise allow for a "fresh look" in light of our reforms.[765] As the Commission has recognized, for example, early termination provisions can be mutually beneficial by giving providers greater assurance of cost recovery, and giving

[761] *See* 47 U.S.C. § 252.

[762] *See Triennial Review Order*, 18 FCC Rcd at 17404, para. 700. Although section 252(a)(1) and section 252(b)(1) refer to requests that are made *to* incumbent LECs, we have interpreted that in the interconnection agreement context to mean that either the incumbent or the competitive LEC may make such a request, consistent with the parties' duty to negotiate in good faith pursuant to section 251(c)(1). *See Triennial Review Order*, 18 FCC Rcd at 17405, para. 703 n.2087; *see also* 47 U.S.C. §§ 251(c)(1), 252(a)(1), (b)(1). We believe that this adequately addresses concerns about existing interconnection agreements that do not include express change of law provisions.

[763] *See, e.g.*, Verizon Sept. 12, 2008 *Ex Parte* Letter, Attach. at 5–6 (urging that any new intercarrier compensation regime displace such contracts). By the same token, we decline to insulate existing interconnection agreements from the section 252 processes to the extent that some commenters propose that they remain in effect. *See, e.g.*, Letter from Melissa E. Newman, Vice President—Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-337, 04-36, 06-122, 05-195, CC Docket Nos. 01-92, 96-45, 99-68, Attach. at 13 (filed Oct. 7, 2008) (proposing that the Commission "order that those prior arrangements should at least presumptively remain in force after the implementation of a new, unified . . . rate regime").

[764] 47 U.S.C. § 251(a)(1).

[765] Several commenters request that the Commission give them a fresh look at existing contracts. *See, e.g.*, Letter from Richard R. Cameron and Teresa D. Baer, Counsel for Global Crossing, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-152; CC Docket Nos. 01-92, 99-68, 96-45 at 2 (filed Sept. 18, 2008) (asking that the Commission "provide an 18-month window within which carriers can reconfigure their interconnection facilities without incurring reconfiguration charges or early termination liabilities under existing transport contracts"); Ad Hoc *ICC FNPRM* Comments at 22–24 (arguing that customers should be allowed to opt out of existing contracts); Earthlink *ICC FNPRM* Reply at 7 (arguing that end users should have the opportunity to negotiate different terms and, if renegotiation is not possible, be permitted to terminate existing contracts without liability).

customers (whether wholesale or end-users) discounted and stable prices over the relevant term.[766] Indeed, allowing for a fresh look could result in a windfall for customers that entered long-term arrangements, in exchange for lower prices, as compared to other customers that avoided early termination fees by electing shorter contract periods at higher prices.[767] Rather than adopt a rule that these commercial arrangements must be reopened, we will leave such issues to any change-of-law provisions in these commercial arrangements, or to commercial negotiations among the parties.[768]

2. Revenue Recovery Opportunities

294. In the preceding sections of this order, we adopt fundamental changes to the existing intercarrier compensation regimes. These reforms are designed to unify and simplify these mechanisms, consistent with the framework Congress adopted in the 1996 Act. This new approach will result in overall reductions in interstate and intrastate intercarrier compensation rates.[769] In this section, we address the extent to which revenue reductions from carrier-to-carrier charges may be replaced through end-user charges and new universal service support. In prior intercarrier compensation reforms, the Commission largely replaced reductions in intercarrier compensation revenues through a combination of increased end-user charges and new universal service funding.[770] Our actions here carefully balance the need to ensure reasonable revenue recovery by carriers against the potential adverse impact on consumers of increased end-user charges, and the pressure placed on the universal service program to the extent that new subsidies are made available.

295. As an initial matter, we increase the caps on interstate SLCs, and we permit incumbent LECs to increase their SLCs up to the new caps to recover lost interstate and intrastate intercarrier compensation revenues. We also enlist the aid of the Separations Joint Board to evaluate the need for further increases in interstate end-user charges to recover any net loss in interstate and intrastate intercarrier compensation revenues, and to evaluate the conditions under which carriers may seek additional universal service funding. To limit the increase in the total universal service fund, we establish certain preconditions that carriers must satisfy before they can receive additional universal service funding to compensate for lost intercarrier compensation revenues.

a. End-User Charges

296. In this section, we consider whether revenue reductions from reformed carrier-to-carrier

[766] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17400, 17402–03, paras. 692, 697–99; *see also, e.g.*, AT&T *ICC FNPRM* Reply at 17–19 (arguing against giving end users a fresh look at existing contracts). To the extent that there is evidence that particular termination penalties are inappropriate, the Commission can resolve such a matter through an enforcement proceeding. *See Triennial Review Order*, 18 FCC Rcd at 17403, para. 698.

[767] *See Triennial Review Order*, 18 FCC Rcd at 17403, para. 699.

[768] This situation is thus different than cases where the Commission found that certain contract provisions might adversely affect competition or where end-user customers would be denied the benefits of new Commission policy absent a fresh look opportunity. *See, e.g.*, *Local Competition First Report and Order*, 11 FCC Rcd at 16044, para. 1094; *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7341, 7350, para. 21 (1993) (allowing a fresh look at agreements in "situations where excessive termination liabilities would affect competition for a significant period of time"); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5907, para. 151 (1991) (giving customers of AT&T 90 days to terminate their contracts without penalty to let them "tak[e] advantage of 800 number portability when it arrives").

[769] *See supra* paras. 186–268.

[770] *See supra* paras. 159–185.

charges should be replaced to any extent by increases in end-user charges, as the Commission has done in some prior intercarrier compensation reform proceedings.[771] The Commission has acknowledged that "[t]he concept that users of the local telephone network should be responsible for the costs they actually cause is sound from a public policy perspective and rings of fundamental fairness," and also helps ensure "that ratepayers will be able to make rational choices in their use of telephone service."[772] Importantly, however, the Commission also has maintained "safeguards that ensure that the rates consumers pay . . . remain well within a zone of reasonableness."[773] To permit carriers to recover at least part of their lost intercarrier compensation revenues, we raise the caps on interstate SLCs as described below, which we find to be within the "zone of reasonableness" and which should not have a significant adverse effect on telephone penetration. We also enlist the help of the Separations Joint Board to consider the need, if any, for further increases in end-user charges and certain other revenue recovery issues.

297. The record reveals a wide variety of proposals for modifying interstate end-user charges in response to reductions in intercarrier compensation rates. The majority of these proposals advocate increasing the caps on the interstate SLCs. The interstate SLC is a flat-rated charge that recovers the interstate portion of local loop costs from an end user. Under our current rules governing incumbent LECs, SLCs are subject to a cap that varies based upon whether the line is: (a) a primary residential or single-line business line; (b) a non-primary residential line; or (c) a multi-line business or Centrex line.[774] Some parties propose specific increases in SLC caps to offset a portion of the revenues lost through mandated reductions in intercarrier compensation–including both reductions in interstate and intrastate revenues.[775] Other parties contend that most or all of a carrier's replacement of lost intercarrier compensation revenues should come from increased SLCs.[776] On the other hand, some consumer groups assert that no increase in SLC caps is warranted in response to reductions in intercarrier compensation

[771] *See, e.g.*, *First Reconsideration of 1983 Access Charge Order*, 97 FCC 2d 682; *Access Charge Reform Order*, 12 FCC Rcd 15982; *CALLS Order*, 15 FCC Rcd 12962; *MAG Order*, 16 FCC Rcd 19613.

[772] *First Reconsideration of 1983 Access Charge Order*, 97 FCC 2d at 686, para. 7.

[773] *CALLS Order*, 15 FCC Rcd at 12976, para. 33; *see also, e.g.*, *1983 Access Charge Order*, 93 FCC 2d at 243, para. 4 (finding that a "transitional plan is necessary" in part because "[i]mmediate recovery of high fixed costs through flat end user charges might cause a significant number of local exchange service subscribers to cancel local exchange service despite the existence of a Universal Service Fund" and "[s]uch a result would not be consistent with the goals of the Communications Act").

[774] For price cap and rate-of-return carriers, the current SLC cap for residential and single-line business lines is \$6.50, 47 C.F.R. §§ 69.104(n)(1)(ii)(C), 69.152(d)(1)(ii)(D), and the current SLC cap for multi-line business and Centrex lines is \$9.20, 47 C.F.R. §§ 69.104(o)(1)(i); 69.152(k)(1)(i). Price cap carriers currently also have a SLC cap of \$7.00 for non-primary residential lines. 47 C.F.R. § 69.152(e)(1)(i).

[775] *See, e.g.*, ICF *ICC FNPRM* Comments, App. C at C-7; NARUC Task Force July 24, 2006 *Ex Parte* Letter, Attach. 2 at 7; Letter from Curt Stamp, President, ITTA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach at 2–3 (filed Sept. 19, 2008); Verizon Sept. 12, 2008 *Ex Parte* Letter, Attach. at 6–7; Letter from Mary L. Henze, Executive Director—Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket Nos. 05-337, 06-112, 99-68, 07-135, Attach. at 2 (filed Oct. 9, 2008).

[776] *See, e.g.*, Letter from Anna M. Gomez, Vice President of Government Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, WC Docket No. 04-36 at 5 (filed Oct. 7, 2008); Letter from Kathleen O'Brien Ham et al., Federal Regulatory Affairs, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 8 (filed Oct. 3, 2008); Cox *ICC FNPRM* Comments at 5–6; Eschelon *ICC FNPRM* Comments at 12.

rates.[777]

(i) Current Availability of End-User Charges for Revenue Recovery

298. As an initial matter, we permit incumbent LECs to increase their SLCs up to new caps to recover reductions in interstate intercarrier compensation revenues. In particular, we increase the SLC cap for residential and single-line business lines from $6.50 to $8.00, the non-primary residential line SLC cap from $7.00 to $8.50, and the multi-line business SLC cap from $9.20 to $11.50. We believe that these modest increases in the SLC caps continue to "ensure that the rates consumers pay for the SLC remain well within a zone of reasonableness."[778] Moreover, we believe that these SLC cap increases also address commenters' concerns about the need for some end-user recovery in light of lost intercarrier compensation revenues. Although some commenters argue for more substantial increases in the SLC caps, we note that there is evidence that incumbent LECs charge rates below even the existing caps in a number of instances. For example, the primary residential and single-line business SLC cap is $6.50, but the national average SLC for those lines is $5.93 based on recent Commission data.[779] Similarly, the non-primary residential line SLC cap is $7.00, but the national average SLC for those lines is $5.81.[780] Further, the multi-line business and Centrex line SLC cap is $9.20, but the national average SLC for those lines is $6.30—nearly $3.00 below the cap.[781] We therefore find it reasonable in the first instance to raise the interstate SLC cap and to allow carriers whose current SLCs are below the new caps to increase those SLCs to recover revenues lost from interstate and intrastate access charge reductions.[782]

299. To the extent that an incumbent LEC increases its SLCs to recover reductions in its interstate intercarrier compensation revenues and any of its SLCs are still below the relevant caps, we allow those carriers to raise their SLCs further, up to the caps, to recover any net loss in intrastate intercarrier compensation revenues, at least on an interim basis.[783] As a prerequisite for incumbent LECs to increase their SLCs in this manner, we require that the LEC's state retail rates and any intrastate SLC

[777] *See* Letter from Ben Scott, Policy Director, Free Press, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337, CC Docket Nos. 96-45, 01-92, Attach. 2 at 22 (filed Sept. 19, 2008); Letter from David C. Bergmann, Assistant Consumer's Counsel Chair, NASUCA Telecommunications Committee, to Marlene H. Dortch, Secretary, FCC, WC Dockets Nos. 08-152, 07-135, 06-122, 05-337, 05-195, 04-36, 03-109, 02-60, CC Dockets Nos. 02-6, 01-92, 00-256, 99-68, 96-262, 96-45, 80-286 at 10 (filed Sept. 30, 2008); Letter from James S. Blaszak, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337, CC Docket Nos. 96-45, 01-92, Attach. at 4 (filed Oct. 14, 2008).

[778] *CALLS Order*, 15 FCC Rcd at 12976, para. 33. We note that section 54.403 of the Commission's rules provides for Tier 1 lifeline support to cover the tariffed SLCs established by rate-of-return and price cap carriers pursuant to sections 69.104 and 69.152 of the Commission's rules. 47 C.F.R. § 54.403.

[779] 2008 TRENDS IN TELEPHONE SERVICE, tbl. 1.1 (providing national weighted average SLCs for price cap carriers and all LECs in the NECA pool as of June 30, 2008).

[780] 2008 TRENDS IN TELEPHONE SERVICE, tbl. 1.1.

[781] 2008 TRENDS IN TELEPHONE SERVICE, tbl. 1.1

[782] Should a carrier agree to (or tariff) intercarrier charges below those that would be required by the reforms adopted in this order, the difference between the charges it sets and the maximum charges it is allowed to set may not be recovered through increased SLCs, nor may such carriers seek to obtain supplemental universal service support, as described in Part V.C.2, based on that difference.

[783] As discussed below, we are referring to the Joint Board, among other things, the question of whether, and to what extent, net reductions in intrastate intercarrier compensation revenues should be offset by revenues from interstate end-user charges. *See infra* paras. 303–310.

be set at the maximum level permitted under state regulations.[784] This will ensure that revenues from interstate end-user charges will not be used to recover intrastate revenue requirements until the carrier has fully availed itself of all available intrastate revenue opportunities under existing law. We also mandate that any increase in interstate SLC revenues that are intended to recover lost intrastate intercarrier compensation revenues be used by the state in ratemaking to reduce costs or revenue requirements to be recovered in the intrastate jurisdiction.[785]

300. We find that we have authority to allow recovery of intrastate revenue requirements in this manner. For one, the legacy separations regime does not preclude this action. The Commission historically has provided federal funds to cover at least a portion of costs assigned to the intrastate jurisdiction.[786] Although those decisions relied on the Commission's universal service authority pursuant to section 254, we find that we have authority under section 251(g) to allow recovery of intrastate revenue requirements through interstate SLC rates. Section 251(g) empowers the Commission to subject traffic previously encompassed by section 251(g) to the reciprocal compensation regime of section 251(b)(5), including providing for an orderly transition. Allowing incumbent LECs the option to recover certain lost intrastate intercarrier compensation revenues through increases in the interstate SLC, subject to the new caps, furthers such a transition. In particular, this option helps mitigate any need incumbent LECs might have to seek increases in state rates due to decreases in intrastate intercarrier compensation revenues during the initial stages of the transition, pending the Separations Joint Board referral and subsequent Commission action. We also acknowledge that interstate SLC charges are governed by sections 201 and 202 of the Act, and that "the just and reasonable rates required by Sections 201 and 202 . . . must ordinarily be cost-based, absent a clear explanation of the Commission's reasons for a departure from cost-based ratemaking."[787] In the past, the Commission has, in fact, adopted regulatory approaches that deviated from cost-based ratemaking.[788] We find such an approach warranted here to help mitigate regulatory burdens during the transition, as described above.

301. In sum, we adopt increased SLC caps to allow incumbent LECs to recover some or all of their net loss in intercarrier compensation revenues resulting from rate reductions pursuant to this order. In particular, to recover those lost revenues, we permit incumbent LECs to increase each of their SLCs up to the new caps.

[784] To the extent that a carrier's state retail rates have been deregulated, that carrier may not increase its SLCs to recover any net loss in intrastate intercarrier compensation revenues.

[785] *Cf. Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20486–87, para. 106 (1999) (*Universal Service Ninth Report and Order*) (specifying that "hold-harmless" universal service support "should continue to operate through the jurisdictional separations process to reduce book costs to be recovered in the intrastate jurisdiction.").

[786] *See, e.g.*, *Universal Service Ninth Report and Order*, 14 FCC Rcd 20432 (providing high-cost universal service support for intrastate costs).

[787] *Access Charge Reform Second Order*, 12 FCC Rcd at 16619–20, para. 44 (citing *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996)).

[788] *See, e.g.*, *LEC Price Cap Order*, 5 FCC Rcd 6786 (adopting price cap regulation, under which rates are not tied directly to cost); *Pricing Flexibility Order*, 14 FCC Rcd 14221, 14307, para. 168 (once price cap carriers are granted pricing flexibility, they lose the option of a low end adjustment, which would permit incumbent LECs earning rates of return less than 10.25% in a given year to increase their price cap indices to a level that would enable them to earn 10.25%.); *MCI Telecomms. Corp. v. U S WEST Commc'ns, Inc.*, File Nos. E-97-08, E-97-20 through 24, Memorandum Opinion and Order, 15 FCC Rcd 9328, 9334, para. 14 (2000) (finding that incumbent LECs' non-cost-based PICC did not violate section 201(b) given the Commission's prior establishment of a safe harbor).

302. With respect to non-incumbent LECs, we note that most interstate rates of such providers are not subject to *ex ante* regulation by the Commission. Thus, we allow those carriers to recover any net loss in intercarrier compensation revenues in any lawful manner.[789]

(ii) Joint Board Referral of Possible Changes to End-User Charges

303. We enlist the aid of the Separations Joint Board to evaluate the need for any additional increases in interstate end-user rates for carriers to recover any net loss in interstate and/or intrastate intercarrier compensation revenues as a result of the reform measures we adopt today. There are a range of widely divergent proposals in the record regarding the need for additional changes to the SLC caps adopted above as part of comprehensive intercarrier compensation reform. We believe that the information and analysis developed by the Separations Joint Board will be extremely valuable in evaluating these issues.

304. Our decision to seek input from the Separations Joint Board is consistent with section 410 of the Act. Section 410(c) of the Act requires the Commission to refer to the Separations Joint Board any changes to the separations rules being considered through a rulemaking proceeding. Although no changes to the separations rules are at issue here, section 410(c) also authorizes the Commission to refer matters "relating to common carrier communications of joint Federal-State concern to a Federal-State Joint Board."[790] We believe that recommendations from a Joint Board regarding these issues are important to striking the right balance among the various policy goals at stake, relating to traffic that historically has been regulated, in part, by both federal and state jurisdictions. Moreover, the issue of using revenues from interstate end-user charges to recover intrastate revenue requirements is sufficiently related to the underlying separations requirements themselves that we believe the Separations Joint Board possesses highly relevant expertise to provide recommendations on these issues.[791]

305. As described in greater detail below, we refer to the Separations Joint Board certain specific issues regarding possible increases in interstate end-user charges: (i) whether SLC caps should be increased by a fixed amount to recover any net loss in intercarrier compensation revenues; (ii) whether a "flexible" SLC cap should be used in conjunction with an overall benchmark or threshold; or (iii) some combination of those options.

306. *Quantifying Any Increase in End-User Charges.* We refer to the Separations Joint Board several possible approaches for establishing any additional permissible increases in interstate end-user charges, to the extent that any are warranted. First, the Separations Joint Board could directly recommend

[789] *Cf. Telephone Number Portability*, CC Docket No. 95-116, Third Report and Order, 13 FCC Rcd 11701, 11725–26, 11773–80, paras. 39, 135–49 (1998) (carriers other than incumbent LECs permitted to recover such costs in any lawful manner).

[790] 47 U.S.C. § 410(c).

[791] The Commission has referred non-separations issues to the Separations Joint Board previously. *See, e.g., MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules*, CC Docket Nos. 78-72, 80-286, Further Notice of Proposed Rulemaking, 49 Fed. Reg. 18318, 18318, para. 1 (1984) (referring to a Separations Joint Board issues including: (1) the subscriber line charge for residential and single-line business customers; (2) the transition mechanism for implementing subscriber line charges for these customers; (3) an exemption from the subscriber line charge or other assistance for low income households; and (4) additional assistance for small telephone companies.); *MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules*, CC Docket Nos. 78-72, 80-286, Recommended Decision, 49 Fed. Reg. 48325, 48327, para. 9 n.20 (1984) (noting that "[s]ince these issues do not involve the allocation of costs between the jurisdictions, preparation of a Joint Board recommendation is not mandatory.").

particular further increases in the SLC caps. Parties here have proposed various levels of SLC cap increases, and different ways to distribute those increases across the different SLC caps. For example, the ICF proposal would result in all SLC caps being increased to $10.00 by the end of a transition period.[792] Under the Missoula Plan's initial proposal, SLC cap increases vary for the three "tracks" or categories of carriers defined in the plan.[793] ITTA proposes a $2.25 increase in each SLC cap by the end of a transition period, subject to a benchmark consisting of SLCs, retail rates, and certain other charges.[794] Other parties, such as CTIA, contend that recovery of lost intercarrier compensation revenues by incumbent LECs should come solely from end-user charges.[795] In contrast, Free Press, NASUCA, and Ad Hoc propose that SLC caps not be increased at all.[796]

307. Second, the Separations Joint Board could recommend a "flexible" SLC cap that would vary depending upon a carrier's other end-user rates and an overall benchmark or threshold. For example, under a recent Verizon proposal, the 'default' SLC caps all would increase to $10.00 by the end of a transition period.[797] However, to the extent that a carrier's relevant end-user rates still are below a proposed benchmark, that carrier's SLC cap would increase as much as needed to reach the benchmark.[798] Thus, the Separations Joint Board could determine a particular benchmark or threshold and allow the SLC cap to vary for each carrier, depending upon how much "headroom" that carrier has under the benchmark, in light of the carrier's other rates. To the extent that the Separations Joint Board recommends this approach, it should specify which carrier rates should be included in the relevant benchmark or threshold.

308. Third, the Separations Joint Board could recommend some combination of the first and second options.

309. In making recommendations on these issues, the Separations Joint Board will consider the extent to which any recommended increases in interstate end-user charges should be used to offset lost intrastate intercarrier compensation, to the extent that decreases in interstate intercarrier compensation revenues already have been recovered. Most comprehensive reform proposals in the record assume that SLC cap increases will be used to offset at least some intrastate revenues.[799] Logically, however, another alternative is for any increases in the SLC caps to be used only to recover reductions in interstate intercarrier compensation revenues, and to leave it to each state to address lost intrastate intercarrier compensation revenues as appropriate under state law.

[792] ICF *ICC FNPRM* Comments, App. C at C-7.

[793] NARUC Task Force July 24, 2006 *Ex Parte* Letter, Attach. 2 at 7.

[794] ITTA Sept. 19, 2008 *Ex Parte* Letter, Attach. at 2–3.

[795] CTIA Oct. 2, 2008 *Ex Parte* Letter, Attach. at 10. *See also, e.g.*, Letter from Norina Moy, Director, Government Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, CC Docket No. 01-92 at 2 (filed Aug. 7, 2008).

[796] Letter from Ben Scott, Policy Director, Free Press, Washington Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337, CC Docket Nos. 96-45, 01-92, Attach. 2 at 22 (filed Sept. 19, 2008); NASUCA Sept. 30, 2008 *Ex Parte* Letter at 10; Letter from James S. Blaszak, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337, CC Docket Nos. 96-45, 01-92, Attach. at 4 (filed Oct. 14, 2008).

[797] Verizon Sept. 12, 2008 *Ex Parte* Letter at 6–7.

[798] Verizon Sept. 12, 2008 *Ex Parte* Letter.

[799] To the extent that interstate end-user charges are used to offset any lost intrastate intercarrier compensation revenues, we mandate that the states take account of those revenues in their state ratemaking by reducing the intrastate costs or revenue requirement to be recovered through intrastate rates.

310. *Timing.* We direct the Separations Joint Board to issue its recommended decision not later than one year from the effective date of this order. In light of that timetable, we limit the Separations Joint Board to consideration of specific issues we refer in this order.

b. Universal Service Support

(i) Policy Approach

311. We recognize that the actions we take to reform intercarrier compensation will result in reduced revenues for many carriers. As discussed above, carriers have the opportunity to replace certain of those lost revenues through end-user charges.[800] We also acknowledge that, in the past, the Commission has sometimes provided new universal service support to replace reductions in intercarrier compensation revenues.[801] As the Fifth Circuit has recognized, however, "[b]ecause universal service is funded by a general pool subsidized by all telecommunications providers—and thus indirectly by customers - excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market." [802] Thus, excessive universal service subsidization could, perversely, cause undesirable increases in consumers' bills.

312. We note that many companies—in particular price cap carriers—consistently are paying dividends and are using the same supported network to provide both regulated services and non-regulated services. Throughout the course of our comprehensive reform proceedings, commenters have identified this as a concern to be weighed carefully when evaluating the need for universal service support. For example, following the 2005 intercarrier compensation Further Notice, CTIA contended that some rural incumbent LECs already "are overcompensated by universal service support" based on evidence that their "stocks generate returns, measured by market-to-book ratios, far in excess of, and exhibit significantly lower risk premiums than, the supposedly more secure RBOCs."[803] Commenters continue to express concern that existing universal service subsidies too often lead simply to "'high overhead, sumptuous earnings, [and] rich dividends.'"[804] For example, recent news reports indicate that CenturyTel and Embarq still "remain highly profitable – operating margins for both are 27 percent" notwithstanding any competition they face.[805] Parties have argued that there continues to be evidence that "[i]nvestors place a higher value on RLEC earnings than on other ILEC earnings. In today's market, the larger ILECs, which do not generate much of their revenues from federal subsidies, are valued much less highly per dollar of profit."[806] While there are "various factors in play" this suggests that "[m]illions of dollars in extra wealth end up in the hands of private investors" by "transferring income from telephone users to phone

[800] In this order, we do not decide the maximum amount that incumbent LECs ultimately may charge customers in the form of interstate end-user charges. As discussed above, that will depend upon further Commission action based on recommendations from the Joint Board.

[801] *See, e.g., CALLS Order*, 15 FCC Rcd 12962; *MAG Order*, 16 FCC Rcd 19613; *see also MAG* Second *FNPRM*, 19 FCC Rcd 4122.

[802] *Alenco*, 201 F.3d at 620.

[803] CTIA *ICC FNPRM* Comments at 37 citing Western Wireless Reply, CC Docket No. 96-45, Attach. at 2–5 (filed Dec. 14, 2004) (attaching Economics and Technology, Inc., *Reforming Universal Service Funding for Rural ILECs: An Idea Whose Time Has Come*).

[804] Thomas W. Hazlett, *"Universal Service Telephone Subsidies: What Does $7 Billion Buy?* (*Universal Service Telephone Subsidies*) at 33, *attached to* Core *Missoula Phantom Traffic* Comments, Tab B (quotation omitted).

[805] *A Fair Copper*, FINANCIAL TIMES, Oct. 28, 2008, at 16.

[806] *Universal Service Telephone Subsidies* at 34.

company stockholders."[807] Indeed, commenters note that "some carriers owned by co-ops pay their members annual dividends that exceed their members' local phone charges."[808] In light of these concerns and the mandates of section 254, we agree with commenters that it is not appropriate to require all universal service contributors to pay into the fund so that these carriers can continue to pay dividends.[809]

313. Thus, rather than guaranteeing revenue neutrality, as some commenters propose,[810] we take steps here to ensure that any new universal service subsidies are targeted carefully to situations where they are most crucially needed. In particular, far from the regulated monopolies of years past, significant marketplace developments have resulted in additional revenue opportunities for carriers. As NASUCA observes, "[i]ntercarrier compensation, SLCs and the USF are but three of the numerous spigots from which dollars flow to fill up the telephone companies' revenue buckets."[811] "By way of illustration," NASUCA points out that "using their common local loop platform, carriers are now generating billions of dollars in digital subscriber line ("DSL") revenues that they did not generate five or ten years ago."[812] Indeed, Time Warner Telecom has pointed to evidence that, for some carriers, "revenue derived from the ILECs' advanced services more than doubles the revenue from switched access

[807] *Universal Service Telephone Subsidies* at 34, 70. *See also* Julie Tanner, General Counsel, Chinook Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket Nos. 05-337, 08-10, Attach. 1 at 7 (filed Feb. 22, 2008) (arguing that incumbent LECs receiving universal service support "send a comfortable return on investment to investors (and rural cooperative members) with no accountability"); NTCH, CC Docket No. 96-45, WC Docket Nos. 05-337, 08-10 at 8 (filed Feb. 22, 2008) ("The object of the [universal service] subsidy is not to prop up high cost legacy companies and technologies or assure their profitability, nor to add to the profits of wireless carriers.").

[808] *Universal Service Telephone Subsidies* at 70.

[809] *See, e.g.*, GCI *Missoula Phantom Traffic* Comments at 68 ("Even if excessive support does not lead to unaffordable increases in rates for non-subsidized subscribers, requiring those customers to pay more than is necessary in order to excessively subsidize rates for other [services] (or worse yet, to finance high dividend payments to owners of rural ILECs) is not consistent with maintaining just and reasonable rates."); Time Warner Telecom *Missoula Phantom Traffic* Comments at 10 (noting that "RBOCs are already realizing substantial profits from [network] investments, easily compensating for any loss in access payments that they may face" and that "a high [universal service] contribution level may approach the point at which the USF charges imposed upon end-users actually threaten the goal of universal service").

[810] *See, e.g.*, CenturyTel Sept. 19, 2008 *Ex Parte* Letter, Attach. at 5 (arguing that revenue neutrality should be a fundamental goal of comprehensive intercarrier compensation reform); Letter from Stuart Polikoff, Director of Government Relations, OPASTCO, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 01-92, WC Docket Nos. 04-36, 05-337, 06-122, Attach. at 3 (filed Sept. 16, 2008) (arguing that, if the Commission does not adopt the Missoula Plan, it should establish a mechanism for "rural RoR ILECs that allows for full recovery of the revenues lost as a result of the change in intrastate access rates and structure, on a revenue neutral basis."). *See also* Rural Alliance *ICC FNPRM* Comments at 21 (arguing that decreases in intercarrier compensation rate levels should be offset from the USF or another revenue replacement mechanism).

[811] NASUCA Sept. 30, 2008 *Ex Parte* Letter at 6.

[812] Comments of the National Association of State Utility Consumer Advocates to Refresh the Record, CC Docket Nos. 96-45, 02-6, 01-92, 00-256, 96-262, 99-68, 80-256, WC Docket Nos. 05-337, 07-135, 06-122, 05-195, 03-109, 02-60 at 6 (filed July 7, 2008) (NASUCA July 7, 2008 Supp. Comments). *See also id.* at 10 ("Adding insult to injury, there is no consideration in the Missoula Plan of the additional revenues that ILECs gain from serving new broadband lines which are outside of the current ICC system. In other words, ILECs are losing lines and MOU as consumers drop traditional landlines and add broadband lines to access the Internet. However, the revenue gains from broadband line additions are totally out of the picture as far as the Missoula Plan is concerned.").

services."[813] Thus, Free Press observes that "the unregulated revenue streams of rate-of-return and price cap Local Exchange Carriers serving in high-cost areas" are the "500 pound gorilla in the room," and it contends that "these revenues" should be "considered in the discussions of 'need' for the purposes of universal service."[814] We agree that such "new and growing source[s] of revenues should mitigate the impact of intercarrier compensation reform for rural and other carriers."[815]

314. We are concerned that universal service support be targeted to those companies whose reduced intercarrier compensation revenues truly are needed to continue providing quality service at affordable rates, and that it should not simply enable the company to pay bigger dividends to shareholders or pad a company's bottom line. Therefore, for price cap carriers, we adopt the proposal of various commenters to consider all a company's costs and revenues—both regulated and non-regulated—before providing new universal service support.[816] Thus, price cap incumbent LEC seeking universal service funding to replace lost intercarrier compensation revenues must make such a showing to the Commission when petitioning for such support. We recognize that rate-of-return carriers present a special situation, because under our rules they must be provided an opportunity to earn the rate of return established by our orders.[817] As a result, we do not impose a similar condition before rate-of-return carriers can recover universal service support.

315. We also agree with proposals that carriers fully avail themselves of existing opportunities for end-user recovery before collecting new universal service subsidies.[818] To the extent that regulators

[813] Time Warner Telecom *Missoula Phantom Traffic* Comments at 10 ("According to AT&T, the revenue derived from the ILECs' advanced services more than doubles the revenue from switched access services. As AT&T stated in its Annual Report, '[w]e have found that when customers add broadband to a basic package, they are 40 percent less likely to switch to another provider, and average revenue per customer jumps nearly 120 percent.' It would make little sense for the ratepayers to subsidize the ILECs' already profitable business decisions.").

[814] Free Press Oct. 13, 2008 *Ex Parte* Letter at 6. *See also id.* at 6–7 ("While we'd like the Commission to consider a carrier's entire revenue stream before allowing increased USF support to offset lost access revenues" to the extent that there is such support it "should be confined to rate-of-return carriers only.").

[815] NASUCA July 7, 2008 Supp. Comments at 6. Indeed, there is some indication that carriers may be earning excessive returns even with respect to their regulated services. *See, e.g.*, GCI *Missoula Phantom Traffic* Comments at 66–67 (asserting that ACS of Anchorage has regularly earned returns in excess of an 11.25% rate of return on its regulated interstate switched access services, including 32.12% for 1997–98, 30.26% for 1999–2000; 35.29% for 2001–02; and 15.01% for 2003–04).

[816] *See, e.g.*, Letter from Mary C. Albert, Assistant General Counsel, COMPTEL, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket Nos. 05-337, 04-36 at 1 (filed Oct. 2, 2008); NASUCA July 7, 2008 Supp. Comments at 32–34; Letter from Anna M. Gomez, Vice President of Government Affairs, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, WC Docket No. 04-36 at 1–2 (filed Oct. 7, 2008).

[817] *See, e.g.*, Free Press Oct. 13, 2008 *Ex Parte* Letter at 6–7 (noting that, to the extent that there is universal service support to address any net loss in intercarrier compensation revenues, it "should be confined to rate-of-return carriers only."). *But see, e.g.*, GCI *Missoula Phantom Traffic* Comments at 66–67 (asserting that ACS of Anchorage has regularly earned returns in excess of an 11.25% rate of return on its regulated interstate switched access services).

[818] *See, e.g.*, Letter from Donna Epps, Vice President—Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, WC Docket No. 04-36 at 1–2 (filed Oct. 2, 2008); Letter from Robert W. Quinn, Jr., Senior Vice President—Federal Regulatory, AT&T, to Kevin Martin, Chairman, FCC, CC Docket Nos. 01-92, 99-68, 96-45, WC Docket Nos. 07-135, 05-337 at 5–7 (filed July 17, 2008); Letter from Anthony M. Alessi, Senior Counsel, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket No. 05-337 at 3–5 (filed May 23, 2008); Cox *ICC FNPRM* Comments at 12–13.

have determined that rates at a particular level are reasonable, we find it appropriate for carriers to charge those rates in the first instance, rather than pricing below those levels in order to foist recovery of the additional revenues on universal service contributors. Consequently, as additional preconditions for receiving new universal service support, any carrier—whether price cap or rate-of-return—must show that its federal SLC, state SLC (if any), and state retail local service rates are at the maximum levels permitted under existing applicable law.[819]

316. In conjunction, we conclude that the conditions we adopt as prerequisites for obtaining new universal service support adequately target that support to carriers with a genuine need without unduly burdening consumers with excessive new universal service contribution burdens.[820]

(ii) Legal Authority

317. Consistent with our mandate to "ensure that universal service is available at rates that are just, reasonable, and affordable," we establish a new supplement to IAS and ICLS universal service funding mechanism.[821] As we did recently in two other Commission orders that reformed interstate switched access charges, we include here additional universal service funding to keep retail rates affordable while ensuring that maintaining affordable rates does not unduly threaten the financial viability of rate-regulated incumbent LECs.[822] Our decision to establish a new funding mechanism is also consistent with our general authority under section 4(i) of the Act because it furthers our universal service objectives.[823] Mindful of our obligation to ensure that these new subsidies are made available only where essential, however we make new universal service subsidies available subject to specific conditions that will target the support to only those carriers whose circumstances merit it.

(iii) Access to Universal Service Support

318. As discussed below, we limit access to universal service support to incumbent LECs that meet certain preconditions. As an initial matter, we find that limiting such support to incumbent LECs is consistent with their position in the marketplace and the resulting regulatory constraints on their pricing behavior. In a series of orders in the Competitive Carrier proceeding, the Commission distinguished two kinds of carriers—those with individual market power (dominant carriers) and those without market

[819] Although we do not adopt a particular revenue benchmark here, as some commenters propose, the Joint Board may well recommend such an approach. Thus, depending upon the Joint Board's proposal, and the Commission's subsequent action, maximum federal SLCs and/or state retail local rates might be determined, in part, by such a benchmark.

[820] For these same reasons, should a carrier agree to (or tariff) intercarrier charges below those that would be required by the reforms adopted in this order, that carrier may not seek to obtain supplemental universal service support based on the difference between the charges it sets and the maximum charges it is allowed to set.

[821] 47 U.S.C. § 254(i) (requiring that "[t]he Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable."); *see also* 47 U.S.C. §254(b)(1) (stating that "[q]uality services should be available at just, reasonable, and affordable rates").

[822] *See, e.g., CALLS Order*, 15 FCC Rcd at 12971, para. 24; *MAG Order*, 16 FCC Rcd at 19669–70, para. 132.

[823] Section 4(i) provides that the Commission may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Prior to the enactment of section 254 (as part of the 1996 Act), sections 1 and 4(i) provided authority for the Commission's adoption of a universal service fund. *See Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988). *See also New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987) (describing section 4(i) as a "wide-ranging source of authority"), *cert. denied*, 490 U.S. 1039 (1989).

power (non-dominant carriers).[824] The Commission found it appropriate to continue to subject dominant carriers to full regulation under Title II of the Communications Act.[825] Incumbent LECs are dominant carriers in their provision of switched access services and, as a result, are subject to rate regulation.[826] This rate regulation comes in two forms—regulation of intercarrier charges and regulation of end user charges. The Commission regulates interstate end-user charges of incumbent LECs, while the states generally regulate those carriers' intrastate end-user rates. Unlike incumbent LECs, competitive carriers (e.g., such as competitive LECs, CMRS providers, and non-dominant IXCs) lack market power and are considered non-dominant. As a result, their end-user charges are not subject to comparable rate regulation by the Commission and the states.[827]

319. Because incumbent LECs, as a result of their classification as dominant carriers, have had their end-user charges regulated (both in terms of rate levels and rate structures), they have less flexibility than other carriers to recover decreased intercarrier revenues through end-user charges. As a result, they are less likely to be able to recover reductions in intercarrier compensation revenues resulting from the actions we take today. Accordingly, we conclude that access to universal service support should be limited to incumbent LECs that meet the necessary preconditions. For this reason, we disagree with parties that advocate making funding available to all carriers, both incumbent and competitive[828] or to all

[824] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (*Competitive Carrier Second Report and Order*); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), *vacated, AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Competitive Carrier Fifth Report and Order*); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated, MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (*Competitive Carrier Sixth Report and Order*), *aff'd, MCI v. AT&T*, 512 U.S. 218 (1994) (collectively, the *Competitive Carrier* proceeding); *see* 47 C.F.R. § 61.3(q), (y).

[825] *Competitive Carrier First Report and Order*, 85 FCC 2d at 10–11, para. 26.

[826] *See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, WC Docket No. 02-112; CC Docket No. 00-175, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16484, para. 90 (2007).

[827] For instance, the Commission has declined to regulate the SLCs of competitive LECs. *See Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps; Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262, 94-1, Order, 17 FCC Rcd 10868, 10870 n.8 (2002) (subsequent history omitted); *see also CLEC Access Charge Order*, 16 FCC Rcd at 9955, para. 81 (stating that competitive LECs competing with CALLS incumbent LECs are free to build into their end-user rates a component equivalent to the incumbent LEC's SLC).

[828] *See, e.g.*, T-Mobile Oct. 3, 2008 *Ex Parte* Letter at 9 & n.14 (arguing that "any ICC replacement mechanism be fully portable to competitive carriers in order to fulfill the principles of competitive and technological neutrality."). Sprint argues that a fund that compensates only incumbent LECs (and not competitive LECs, wireless carriers, and IXCs) for lost access revenues is "blatantly anti-competitive." Letter from Anna M. Gomez, Vice President of Government Affairs, Sprint Nextel Corp., to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45; WC Docket No. 04-36 at 4 (filed Oct. 1, 2008). Many CMRS carriers maintain that any replacement mechanism must be fully portable to competitive carriers in order to fulfill the principles of competitive and technological neutrality. *See, e.g.*, Leap *ICC FNPRM* Reply at 18; Allied National *ICC FNPRM* Comments at 10; CTIA *ICC FNPRM* Comments at 37; SouthernLINC *ICC FNPRM* Reply at 9; RCA *ICC FNPRM* Comments at 4; US Cellular

(continued....)

carriers that currently receive access charge revenues.[829] As discussed above, competitive carrier end-user charges are not subject to rate regulation, and those carriers have the opportunity to recover lost access revenue through any legally permissible means.[830] We also reject an approach that would limit funding to rural rate-of-return carriers.[831] Incumbent LECs subject to price cap regulation also are subject to regulatory constraints on end-user charges, and we therefore decline to categorically deny universal service funding to particular types of incumbent LECs.[832]

320. Consistent with the policy approach discussed above, we further find it necessary to establish certain requirements that an incumbent LEC must satisfy to receive the new universal service subsidies. Before seeking universal service funding, incumbent LECs must first demonstrate that their end-user charges are at the maximum allowable rate levels. Thus, incumbent LECs must show that they are charging the maximum interstate SLCs permitted under applicable law, and they must make the same showing with respect to any intrastate SLCs. In addition, incumbent LECs must demonstrate that their retail local rates are at the maximum allowable amount based on applicable state regulation. Incumbent LECs operating in states where retail rates are deregulated are not entitled to the new universal service

(continued from previous page) *ICC FNPRM* Comments at 4; T-Mobile *ICC FNPRM* Comments at 26; Dobson and American *ICC FNPRM* Comments at 10.

[829] *See, e.g.*, ICF *ICC FNPRM* Comments at 32–33 (stating that any funding should be temporary and limited to those that lose access revenue because of intercarrier compensation reform); USTA *ICC FNPRM* Comments at 40 (arguing that funding should not compensate wireless carriers and that it should not be portable); CCAP *ICC FNPRM* Reply at 14 (stating that funding "should not be portable to competitive eligible telecommunications carriers."); Letter from Susanne A. Guyer, Senior Vice President of Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, Attach. at 7 (filed Oct. 12, 2008) (asserting that funding should compensate only LECs that have lost revenues because of intercarrier compensation reform); Letter from Curt Stamp, President, ITTA, to Marlene H. Dortch, Secretary, FCC, Docket Nos. 01-92, 04-36, 96-45, 05-337, Attach. at 9 (filed Oct. 3, 2008) (arguing that the Commission should "limit duplicative networks" by prohibiting wireless carriers and other carriers that do not receive access compensation from benefiting from the fund); Letter from Alex J. Harris, Vice President—Regulatory, Frontier, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. at 16, 18 (filed May 11, 2005) (proposing that the funding be confined to incumbent LECs in rural study areas but available to all carriers that lost access revenues in non-rural study areas); *see also* Letter from Brad E. Mutschelknaus, Counsel to XO Communications, Kelley Drye & Warren LLP, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, WC Docket No. 06-122, Attach. at 4 (filed Oct. 3, 2008) (contending that revenue replacement funding should either be "competitively neutral" or limited to only rate-of-return carriers).

[830] Some competitive LECs claim that, in practice, they have little opportunity to recover their costs because the incumbent LEC, whose prices are regulated, effectively sets a ceiling on the prices they charge. *See, e.g.*, COMPTEL *Missoula Phantom Traffic* Comments at 7. Although we acknowledge that, in a homogeneous goods market with a single price, such an argument might be plausible, we do not find such assumptions apply in modern telecommunications markets. In particular, with modern telecommunications technology, carriers are offering an expanding number of new services and marketing them through a variety of bundled service offerings. As a result, telecommunications services are becoming much more of a differentiated product, and competitors have greater opportunity to offer niche services. In light of these developments, we find unpersuasive arguments that competitors are effectively price regulated and thus do not have an opportunity to recover lost access revenues.

[831] *See, e.g.*, NCTA *ICC FNPRM* Comments at 11 (arguing that funding should be limited to "non-Tier 1 rural carrier[s]"); NTCA *ICC FNPRM* Comments at 56 (asserting that funding "should be targeted at rural ILECs exclusively"); Comments of the Rural Alliance, CC Docket No. 01-92 at 4 (filed Jun. 27, 2008) (stating that the fund should only compensate rural rate-of-return carriers that lose access revenues).

[832] For these same reasons, should a carrier agree to (or tariff) intercarrier charges below those that would be required by the reforms adopted in this order, that carrier may not seek to obtain supplemental universal service support based on the difference between the charges it sets and the maximum charges it is allowed to set.

funding adopted here. In this case, these incumbent LECs will be similarly situated to competitive carriers, because without regulation, they have the opportunity to recover lost access revenues due to intercarrier compensation reform through increased end-user charges.

321. As discussed below, there are additional requirements to qualify for universal funding that vary depending on whether a carrier is subject to price cap or rate-of-return regulation. In either case, the incumbent LEC bears the burden of demonstrating that it is entitled to such funding based on the following criteria.

322. *Rate-of-Return Incumbent LECs.* For incumbent LECs subject to rate-of-return regulation, a carrier may qualify for universal service funding if it can demonstrate that, it will not have a reasonable opportunity to earn its authorized rate of return as a result of its net loss of revenues caused by the changes in intercarrier compensation rates resulting from this order, even after having increased its interstate SLC, state SLC (if any), and state retail local rates to the maximum permitted by applicable law.

323. *Price Cap Incumbent LECs.* For incumbent LECs subject to price cap regulation, a carrier may qualify for universal service funding if it can demonstrate that, as a result of reduced and reformed intercarrier charges, and after accounting for increased end-user charges, it is still unable to earn a "normal profit." In the *Local Competition First Report and Order*, the Commission discussed the concept of normal profit and defined it as the "total revenue required to cover all the costs of a firm, including its opportunity costs."[833]

324. As described above, many companies—in particular, price cap carriers—consistently are paying dividends and are using the same supported network to provide both regulated services and non-regulated services.[834] We do not find it appropriate to require all universal service contributors to pay into the fund to provide for "'high overhead, sumptuous earnings, [and] rich dividends'" on the part of these carriers.[835] Indeed, as discussed above,[836] "[i]ntercarrier compensation, SLCs and the USF are but three of the numerous spigots from which dollars flow to fill up the telephone companies' revenue buckets"[837] in addition to other nonregulated services that use "their common local loop platform."[838]. Therefore, in determining whether this criterion is met, the Commission will evaluate the total costs and total revenues of the company as a whole, including those from both regulated and non-regulated sources.[839] While this is a more stringent showing than that required of rate-of-return carriers, we find such differences warranted by the different rate regulation frameworks. In light of our reforms, we find it appropriate, upon request, to allow price cap carriers to make a one-way election of rate-of-return regulation.[840]

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[833] *Local Competition First Report and Order*, 11 FCC Rcd at 15854, para. 699.

[834] *See supra* para. 312.

[835] *Universal Service Telephone Subsidies* at 33.

[836] *See supra* para. 313.

[837] NASUCA Sept. 30, 2008 *Ex Parte* Letter at 6.

[838] NASUCA July 7, 2008 *Ex Parte* Letter at 6.

[839] The non-regulated costs and revenues to be included in this calculation are those associated with non-regulated activities involving the common or joint use of assets or resources in the provision of both regulated and non-regulated products and services.

[840] Pursuant to section 61.41(d) of the Commission's rules, once a carrier is subject to price cap regulation, it may not "withdraw from such regulation." 47 C.F.R. § 61.41(d); *see also* 47 C.F.R. § 61.41(b), (c) (requiring conversion from rate-of-return to price cap regulation under certain circumstances). Under section 1.3 of the Commission's

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325. We recognize that the conditions by which we would make universal service funding available may not ensure that all carriers recover all reduced intercarrier compensation revenues that result from the reforms we adopt here. We reject the assertion by some carriers that any revenue replacement mechanism adopted by the Commission in the context of intercarrier compensation reform must ensure absolute revenue neutrality.[841] We agree with commenters who maintain that the Commission has no legal obligation to ensure that carriers recover every dollar in access revenues lost as a result of reform, absent a showing of a taking.[842] We conclude that certain increased end-user charges and narrowly targeted supplemental IAS or ICLS universal service support will provide a reasonable opportunity to recover revenues lost as a result of our intercarrier compensation reform, and to earn a reasonable profit. Such recovery, however, is not automatic and whether a particular carrier is entitled to any revenue recovery will be considered on a case-by-case basis based on the criteria outlined here.

D. Measures to Ensure Proper Billing

1. Introduction

326. As explained in Part V.A., the current disparity of rates under existing intercarrier compensation mechanisms presents service providers[843] with the opportunity and the incentive to misidentify or otherwise conceal the source of traffic to avoid or reduce payments to other service providers. In this Part, we amend our rules to help ensure the ability of service providers to receive the appropriate compensation for traffic terminated on their networks.[844] More importantly, we believe that

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rules, however, "any provision of the Commission's rules may be waived by the Commission . . . if good cause therefore is shown." 47 C.F.R. § 1.3. As interpreted by the courts, this requires that a petitioner demonstrate that "special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest." *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969)). In other circumstances in the past, the Commission has found good cause to waiver section 61.41(d) and other related provisions of the Commission's rules to enable operations subject to price cap regulation to convert to rate-of-return regulation. *See, e.g., ALLTEL Corp. Petition for Waiver of Section 61.41 of the Commission's Rules and Application for Transfer of Control*, CCB/CPD No. 99-1, Memorandum Opinion and Order, 14 FCC Rcd. 14191 (1999); *CenturyTel of Northwest Arkansas, LLC et al., Joint Petition for Waiver of Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules, Petition for Waiver of Sections 61.41(c) and 69.3(g)(2) of the Commission's Rules*, CC Docket No. 96-45, Memorandum Opinion and Order, 15 FCC Rcd 25437 (Acc. Pol. Div. 2000); *ALLTEL Service Corporation, Petition for Waiver of Section 61.41 of the Commission's Rules*, Order, 8 FCC Rcd 7054 (Com. Car. Bur. 1993) (granting waiver of sections 61.41(c), (d) of the Commission's rules). Likewise, as noted above, we find it appropriate, upon request, to allow price cap carriers to make a one-way election of rate-of-return regulation.

[841] *See supra* para. 313.

[842] *See, e.g.*, Ad Hoc *ICC FNPRM* Reply at 10–11 (arguing that the Commission has no legal obligation to allow revenue neutrality); CTIA *ICC FNPRM* Comments at 46; Nextel *ICC FNPRM* Comments at 20; T-Mobile *ICC FNPRM* Comments at 13 (intercarrier compensation was not intended to guarantee an ILEC revenue stream or preserve low local rates for a given industry segment, doing so would perpetuate inefficiencies); NASUCA *ICC FNPRM* Reply at 34–38 (arguing that the Commission is not required to provide for revenue neutrality and that revenue neutrality deviates from the Commission's past policy).

[843] We use the term "service providers" in this section to refer both to carriers that provide telecommunications services and to providers of services that originate calls on IP networks and terminate them on circuit switched networks.

[844] Parties frequently use the term "phantom traffic" in describing this problem. We will not use that term in the regulations we adopt here because there is no consensus as to how it should be defined, nor is such a definition necessary for us to address the underlying issues faced by service providers in billing for traffic they receive.

the comprehensive compensation reforms we adopt today should significantly reduce service providers' incentives to mislabel traffic or otherwise to try to avoid their financial obligations.[845] Nonetheless, we balance a desire to facilitate resolution of billing disputes with a reluctance to regulate in areas where industry resolution has, in many cases, proven effective. We find that the requirements we adopt here will facilitate the transfer of information to terminating service providers, and improve their ability to identify providers from whom they receive traffic, without imposing burdensome costs. In the event that traffic does not contain the information required by our rules, or the provider delivering the traffic does not otherwise provide the required call information, for example by providing an industry-standard billing record, to the provider receiving it, we allow the terminating service provider to charge its highest terminating rate to the service provider delivering the traffic. To the extent that a provider acting simply as an intermediate provider (such as a transit provider) becomes subject to a charge under this provision, that intermediate provider can charge the rate it was charged to the provider that delivered the improperly labeled traffic to it. This will ensure that providers are paid for terminating traffic in those instances, and gives financial incentives for upstream providers in the call path to ensure that the traffic includes proper information in the first instance.

2. Background

327. Problems related to traffic arriving for termination with insufficient identification information arise from the technical systems and processes used to create, transfer, and gather intercarrier compensation billing information. To bill for termination of traffic, a terminating service provider must be able to identify the appropriate upstream service provider, and the location of the caller (or a proxy for the caller's location) in order to determine jurisdiction, which is necessary to determine the appropriate charge under existing intercarrier compensation rules.[846] Calls frequently traverse several networks to connect the calling and called parties. When the originating and terminating networks are not directly connected, as is the case when calls are delivered via tandem transit service, complications with transmitting and receiving billing information related to a call can arise.[847] Terminating service providers that are not directly connected to originating service providers receive information about calls sent to their networks for termination from two sources: Signaling System 7 (SS7) signaling streams[848] and industry

[845] Similarly, we believe that the transition to a uniform intercarrier compensation rate based on the additional costs methodology described above also will address the access stimulation concerns that have recently been raised. *See supra* para. 185. In the unlikely event that service providers persist in these activities, however, we note that the Commission has an open proceeding in which appropriate responses to such actions may be considered. *See generally Access Stimulation NPRM*, 22 FCC Rcd 17989.

[846] This order initiates a process of unifying terminating intercarrier compensation rates, thereby eliminating the rate distinctions between local and long distance calls. Although knowing the origination point of a call remains important, especially during the period of transition to a unified terminating rate, the origination point is less significant for the purpose of determining intercarrier compensation due.

[847] *See, e.g.*, Letter from Patrick J. Donovan, Counsel for PacWest Telecomm, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 3–4 (filed Oct. 14, 2005).

[848] SS7 is an out-of-band signaling system that is separate from, but runs parallel to, the public switched telephone network (PSTN) and is used to set up call paths between calling and called parties. The following steps typically occur when SS7 sets up a call path for a wireline LEC to wireline LEC call originating and terminating on the PSTN. When a wireline LEC customer dials a call destined for an end user served by a different wireline LEC, the calling party's LEC determines, based on the dialed digits, that it cannot terminate the call. The SS7 call signaling system then begins the process of identifying a path that the call will take to reach the called party's network. SS7 identifies each service provider in the call path and provides each with the called party's telephone number and other information related to the call, including message type and nature of connection indicators, forward call indicators, calling party's category, and user service information if that information was correctly populated and not altered

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standard billing records,[849] which typically are provided by the intermediate service provider connecting the terminating provider to the originating provider.[850]

328. One significant source of billing problems is traffic routed through an intermediate provider that does not include calling party number (CPN) or other information identifying the calling party.[851] In addition, commenters describe several examples of other situations where traffic arrives for termination with insufficient information to identify the originating service provider.[852] Another source of disputes occurs when terminating service providers find differences when attempting to reconcile SS7

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during the signaling process. *See* Letter from L. Charles Keller, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Sept. 13, 2005) (Verizon Wireless Sept. 13, 2005 *Ex Parte* Letter). SS7 was designed to facilitate call routing and was not designed to provide billing information to terminating carriers. *See* Verizon, *Verizon's Proposed Regulatory Action to Address Phantom Traffic* at 5–7 (Verizon Phantom Traffic White Paper), attached to Letter from Donna Epps, Vice President, Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Dec. 20, 2005). Technical content and format of SS7 signaling is governed by industry standards rather than by Commission rules, although Commission rules require carriers using SS7 to transmit calling party number (CPN) to subsequent carriers on interstate calls where it is technically feasibly to do so. 47 C.F.R. § 64.1601.

[849] Industry standard billing records are the other common source of information that terminating service providers not directly connected to originating service providers receive about calls sent to their networks for termination. Billing records are typically created by a tandem switch that receives a call for delivery to a terminating network via tandem transit service. Tandem switches create billing records by combining CPN or Charge Number (CN) information from the SS7 signaling stream with information identifying the originating service provider to provide terminating service providers with information necessary for billing. *See* Verizon Phantom Traffic White Paper at 5–7. The tandem switch creating the billing record identifies service providers from whom it receives traffic using the trunk group number (TGN) of the trunk on which a call arrives. *See* Verizon Phantom Traffic White Paper at 4; *see also* Letter from Glenn T. Reynolds, Vice President—Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-92, Attach. at 5 (filed Jan. 12, 2006) (BellSouth Jan. 12, 2006 *Ex Parte* Letter). The tandem switch translates the TGN into one of two codes identifying the originating the service provider: Carrier Identification Code (CIC) if the originating service provider is an IXC, or Operating Company Number (OCN) for non-IXC calls. The appropriate CIC or OCN is then added, by the tandem switch, if it is equipped to record such information, to the billing record for the call, which is then forwarded to the terminating service provider. *See* Verizon Phantom Traffic White Paper at 5–7; *see also* Verizon *ICC FNPRM* Reply at 16. Service providers delivering billing records typically use the Exchange Message Interface (EMI) format created and maintained by the Alliance for Telecommunications Industry Solutions Ordering and Billing Forum (ATIS/OBF), an industry standards setting group. *See* ATIS Exchange Message Interface 22 Revision 2, ATIS Document number 0406000-02200 (July 2005).

[850] *See* Verizon Phantom Traffic White Paper at 5–7.

[851] The Commission recognized that the ability of service providers to identify the provider to bill appropriate intercarrier compensation payments depends, in part, on billing records generated by intermediate service providers. Thus, the Commission sought comment on whether current rules and industry standards create billing records that are sufficiently detailed to permit determinations of the appropriate compensation due. *See Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4743, para. 133.

[852] For example, when a call bound for a number that has been ported to a different service provider is delivered without the responsible service provider performing a local number portability (LNP) query, the call may be delivered to the wrong end office and then may be re-routed to a tandem switch for delivery to the correct end office. *See* Verizon Phantom Traffic White Paper at 18–19. According to Verizon, neither the end office that re-routes the call nor the tandem switch receiving the rerouted call are able to route the call over an access trunk; the call must be sent over a local interconnection trunk. *See id.* In this scenario, the terminating carrier may have difficulty billing the appropriate charges to the IXC that sent the call.

data they record and billing records they receive.[853] Such a reconciliation process will likely be inexact, because SS7 streams were not designed to provide billing information.[854] Similarly, at least one commenter asserts that "problems arise" when terminating service providers "second guess tandem traffic reports and generate their own billing statements for carriers with whom they are indirectly interconnected."[855] In addition to unidentifiable traffic caused by unintended network routing circumstances, as described above, several commenters allege that they receive traffic in which the billing information intentionally has been altered or stripped before the call reaches the terminating service provider.[856] Indeed, numerous parties have described experiencing problems of the sort described above.[857] Several proposals suggesting how the Commission should address this problem have been filed in the record in this proceeding in recent years.[858] Recently, the United States Telecom Association (USTelecom) filed a proposal that appears to enjoy the broadest industry support of any filed to date.[859] For reasons detailed below, we agree that traffic that lacks sufficient information to enable proper billing of intercarrier compensation charges is a problem. Consequently, we take steps to address the problem

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[853] *See* Letter from Stephen T. Perkins, General Counsel, Cavalier Telephone, LLC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 1 (filed Sept. 29, 2005). *See also* Letter from Donna Epps, Vice President, Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 10 (filed Oct. 21, 2005).

[854] *See* Letter from Donna Epps, Vice President—Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. at 5 (filed Aug. 1, 2005); Verizon Wireless Sept. 13, 2005 *Ex Parte* Letter at 2.

[855] Verizon Wireless Sept. 13, 2005 *Ex Parte* Letter at 3.

[856] *See, e.g.*, Balhoff and Rowe *ICC FNPRM* Reply at 10; California Small LECs *ICC FNPRM* Comments at 9; ITCI *ICC FNPRM* Reply at 7; Montana Independent Telecommunications Systems (MITS) et al. *ICC FNPRM* Comments at 14, 20; MITS et al. *ICC FNPRM* Reply at 23–24, 33; NECA *ICC FNPRM* Comments at 16; Rural Alliance *ICC FNPRM* Comments at 108; SureWest *ICC FNPRM* Comments at 7; TDS *ICC FNPRM* Comments at 10; BellSouth Jan. 11, 2006 *Ex Parte* Letter at 6.

[857] *See, e.g.*, Letter from Glenn T. Reynolds, Vice President, Policy, USTA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Feb. 12, 2008) (USTA Feb. 12, 2008 Proposal). *See Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, NECA Petition for Interim Order (filed Jan. 22, 2008) (NECA Petition).

[858] *See, e.g.*, NARUC Task Force July 24, 2006 *Ex Parte* Letter, Attach. 2; Letter from Supporters of the Missoula Plan to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Nov. 6, 2006) (Missoula Plan Supporters Nov. 6 *Ex Parte* Letter or Missoula Plan Call Signaling Proposal); Letter from Donna Epps, Vice President, Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Apr. 4, 2006); Letter from Jeffrey S. Lanning, Associate General Counsel, USTA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Mar. 30, 2006) (MCC/USTA Proposal); Letter from Karen Brinkmann, Attorney for the MidSize Carrier Coalition, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Mar. 31, 2006) (supporting MCC/USTA Proposal).

[859] *See* USTA Feb. 12, 2008 Proposal; *see also* Letter from Melissa E. Newman, Vice President—Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Sept. 24, 2008); Letter from Curt Stamp, President, ITTA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2, filed Sept. 19, 2008); Letter from Eric Einhorn, Vice president, Federal Government Affairs, Windstream, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 et al. (filed Sept. 24, 2008); Comments of Windstream, CC Docket Nos. 99-68, 01-92, 96-45, WC Docket Nos. 08-152, 07-135, 04-36, 06-122, 05-337 at 16 (filed Aug. 21, 2008); Letter from Gregory J. Vogt, Counsel for CenturyTel, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Aug. 6, 2008); Letter from Henry Hultquist, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed July 17, 2008).

and help ensure proper functioning of the intercarrier compensation system.[860]

3. Discussion

329. We amend our rules as described below to facilitate the transfer of necessary information to terminating service providers, particularly in cases where traffic is delivered through indirect interconnection arrangements. These new requirements will assist in determining the appropriate service provider to bill for any call. We note that these new requirements generally reflect standard industry practice, as recommended by several commenters.[861] We also amend our rules to establish payment obligations for service providers that send traffic that lacks the information required by our amended call signaling rules to intermediate or terminating service providers or that does not otherwise provide the required call information to the recipient. Incorporating these practices into our rules will facilitate resolution of billing disputes, will provide incentives to help prevent manipulation or deletion of information from signaling streams, and will provide incentives for service providers to ensure that traffic traversing their networks is properly labeled and identifiable, in compliance with the rules we adopt in this order.[862]

a. Signaling Information

330. We agree with the USTelecom Feb. 12, 2008 Proposal concerning the importance of call signaling obligations.[863] CPN is a critical component of call signaling information. When CPN is populated in the SS7 stream by an originating service provider and passed, unaltered, along a call path to a terminating service provider, the terminating provider can use the CPN information to help determine the applicable intercarrier compensation.

331. We agree with commenters[864] that assert that the best way to ensure that complete and accurate information about a call gets to the terminating service provider for that call is to require providers to populate, and to prohibit them from stripping or altering, CPN information in the SS7 call signaling stream.[865] In an environment where numerous service providers may be involved in the

[860] The rules we adopt herein reflect the Commission's determinations regarding how to address call signaling problems as they relate to unidentified and unbillable traffic. Therefore, we disagree with commenters requesting that we adopt alternative proposals such as the NECA petition or the Missoula Plan Call Signaling Proposal. *See, e.g.*, Letter from Robert F. Aldrich, Counsel to the American Public Communications Council, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 01-92 (filed Oct. 21, 2008).

[861] *See, e.g.*, Letter from Paul Garnett, Director, Regulatory Policy, CTIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 3 (filed Jan. 3, 2006); Letter from Donna Epps, Vice President, Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Mar. 30, 2006).

[862] The rules we amend in this order were adopted in a 1995 order addressing Caller ID services. *See Rules and Policies Regarding Calling Number Identification Service – Caller ID*, CC Docket No. 91-281, Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 11700, 11728, para. 79 (1995) (*Caller ID Order*). In the *Caller ID Order*, the Commission found, inter alia, that the CPN based services to which the rules adopted apply are "jurisdictionally mixed" and the Commission therefore preempted an inconsistent state statute. *Id.* at 11722–23, paras. 62, 85. For these same reasons, to the extent the amendments we make to our call signaling rules in this order conflict with any current or future state statutes, those statutes are preempted. *See id.* at 11728–34, paras. 78–95.

[863] *See* USTA Feb. 12, 2008 Proposal.

[864] *See, e.g.*, USTA Feb. 12, 2008 Proposal; NECA Petition.

[865] Because we agree that requiring population of CPN is the best way to ensure that complete and accurate information about a call gets to the terminating service provider for that call, we disagree with proposals to exclude

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completion of a call, this SS7 signaling information must be passed, unaltered, from one to the next in a call path until it reaches the terminating service provider. We therefore modify our rules to prohibit stripping or altering information in the SS7 call signaling stream. We do not, however, make any changes to the designation of particular fields as mandatory or optional, nor do we otherwise intend to change industry standards that govern the population of the SS7 signaling stream.[866]

332. The record also makes clear that we must expand the scope of our existing rule regarding passing CPN,[867] which currently applies only to service providers using SS7 and only to interstate traffic. We therefore extend these requirements to all traffic originating or terminating on the PSTN, including jurisdictionally intrastate traffic.[868] We also amend our rules to require service providers using MF signaling to pass CPN information, or the charge number (CN) if it differs from the CPN, in the Multi Frequency Automatic Number Identification (MF ANI) field.[869] This rule change will ensure that information identifying the calling party is included in call signaling information for all calls.

333. In addition, we agree with commenters who suggest that our call signaling rules should address CN as well as CPN.[870] Verizon states that, in accordance with industry practice, the CN parameter is not populated in the SS7 stream when it is the same as CPN, but that when the CN parameter is populated, CN is included in billing records in place of CPN.[871] We therefore clarify that populating a CN field with information other than the charge number to be billed for the call, consistent with industry standards, falls within this prohibition. This clarification is not intended to disrupt standard industry practice with regard to using CN in the signaling stream and in billing records. But, we also clarify that the prohibition on altering or stripping signaling information applies to CN as well as CPN. The prohibition on altering or stripping SS7, MF ANI, or CN signaling information obligates intermediate service providers to pass, unaltered, whatever signaling information they receive.

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certain types of traffic from this requirement. *See, e.g.*, Letter from Jim Kohlenberger, Executive Director, The VON Coalition, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket 04-36 at 6 (filed Oct. 28, 2008). We note that parties are free to contract with third parties to ensure that these requirements are met. *Cf., e.g.*, *LNP Order*, 22 FCC Rcd 19531 (holding that, where interconnected VoIP providers rely on other carriers for access to numbers, both parties must take the steps needed to comply with the number porting obligations established in that order); *Interconnected VoIP 911 Order*, 20 FCC Rcd 10245 (finding that interconnected VoIP providers might elect to comply with their 911 obligations in party by relying on services provided by third parties).

[866] We take a cautious approach in considering any new or revised signaling requirements. SS7 was designed to facilitate call setup and routing, and action we take here is not intended to interfere with the ability of calls to reach their intended recipient. As Verizon Wireless explains, certain SS7 fields are considered mandatory, while others (including CPN, CN, and JIP) are considered optional. *See* Verizon Wireless Sept. 13, 2005 *Ex Parte* Letter at 2. The distinction is significant, because a call will not be completed if a mandatory field has not been populated. *See* Letter from Thomas Goode, Associate General Counsel, ATIS, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. (filed Feb. 10, 2006). Although CPN is considered optional in the industry standard, our rules, before and after amendment pursuant to this order, require service providers to pass CPN in specified circumstances. *See* 47 C.F.R § 64.1601.

[867] *See* 47 C.F.R. § 64.1601.

[868] *See supra* note 862.

[869] *See* Missoula Plan at 56; Letter from Brad E. Mutschelknaus, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 11–12 (filed Feb. 14, 2006).

[870] *See, e.g.*, NECA Petition; Letter from Cheryl A. Tritt, Counsel for T-Mobile USA, Inc. to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 6 (filed Feb. 2, 2006); Verizon Phantom Traffic White Paper at 8–10.

[871] *See* Verizon Phantom Traffic White Paper at 8.

334. The call signaling rules we adopt in this order will help ensure that signaling information is passed completely and accurately to terminating service providers. These rules are not intended to affect existing agreements between service providers regarding how to "jurisdictionalize" traffic when traditional call identifying parameters are missing, as long as such agreements are not inconsistent with the rules adopted in this order.

335. We find that some very limited exceptions to these new rules are needed. We agree with Verizon, for example, that a limited exception is needed in situations where industry standards permit, or even require, some alteration in signaling information by an intermediate service provider.[872] As noted above, we do not intend to change standard industry practice with respect to the content of the signaling stream. Service providers that follow standard industry practice in this way will not be considered in violation of the prohibition on altering signaling information. We also note that the exemptions from our existing call signaling requirements described in section 64.1601(d) remain necessary for their limited purposes, and will continue to apply.[873]

b. Financial Responsibilities

336. We also impose financial responsibilities that will work in step with our amended signaling rules to give service providers financial incentives to ensure that they, and the providers whose traffic they carry, comply with the signaling obligations. We find that these requirements will significantly reduce any existing incentives to avoid compliance by substantially eliminating any financial benefits of noncompliance.

337. We agree with commenters who propose that we permit service providers that terminate traffic lacking sufficient information to bill the service provider that delivered the traffic to the terminating provider.[874] In particular, we require that a service provider, e.g., transit provider, delivering traffic that lacks any of the signaling information required by our rules as amended herein, or that does not otherwise provide the required call information, for example by providing an industry standard billing record, to the recipient, must pay the terminating service provider's highest termination rate in effect at the time the traffic is delivered to the terminating service provider.[875] By making intermediate service

[872] *See* Verizon Phantom Traffic White Paper at 9–10. For example, Verizon states that on a call to a party that has forwarded its number, the called party's service provider will replace the caller's CN with the called party's CN before sending the call to the forward location.

[873] 47 C.F.R. § 64.1601(d).

[874] *See, e.g.*, EPG Proposal at 2 ("All messages that are not properly labeled would be billed at the highest prevailing intercarrier compensation rate to the interconnecting carrier delivering the traffic."); ARIC Plan at 55; CenturyTel *ICC FNRPM* Comments at 6; Hickory *ICC FNPRM* Comments at 2 ; JSI *ICC FNPRM* Comments at 4–6; Colorado Telecom Ass'n et al. *ICC FNPRM* Reply at 13, TDS Telecom *ICC FNPRM* Reply 14, JSI *Missoula Phantom Traffic* Comments at 4–6; RICA *Missoula Phantom Traffic* Comments at 2–3; TexalTel *Missoula Phantom Traffic* Comments at 7–8; Cavalier *Missoula Phantom Traffic* Comments at 2–3; PAPUC *Missoula Phantom Traffic* Reply at 8.

[875] We agree with commenters who note that intermediate service providers that provide, to subsequent service providers in a call path, information sufficient to identify the provider that delivered the traffic to the intermediate provider should not be responsible for terminating intercarrier payments for that traffic. *See, e.g.*, Letter from Susanne A. Guyer, Senior Vice President – Federal Regulatory Affairs, Verizon, to Chairman Kevin Martin et al., FCC, CC Docket Nos. 96-45, 01-92 at 2 (filed Oct. 28, 2008); Letter from Mark D. Schneider, Counsel, Neutral Tandem, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Oct. 28, 2008); Letter from Tamar E. Finn, Counsel, Zayo Group, LLC, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 99-68 at 2 (filed Oct. 28, 2008).

providers financially responsible in these circumstances, we ensure that service providers are compensated for terminating traffic.

338. We also permit those intermediate service providers, in turn, to pass along the termination charges to the provider that delivered the applicable traffic to them, in addition to any otherwise-applicable charge for their services. We agree with commenters that the providers delivering traffic are in a better position than the terminating service provider "to know which carriers are routing improperly or incompletely identified traffic"[876] and to recover the termination charges from them. Moreover, by permitting intermediate service providers to pass along those charges on top of their otherwise-applicable rates, we create disincentives for service providers who might otherwise originate, or act as a "pass through" for mislabeled or unidentifiable traffic.

339. We are unpersuaded by the objections to imposing such financial obligations on intermediate service providers.[877] For example, one objection is based on the assumption that transit providers will be the only intermediate service providers subject to such liability, and will be unable to pass along those charges.[878] The financial responsibility under this order for traffic that lacks sufficient billing information is not limited to transit service providers, however. Rather, any service provider that passes traffic lacking sufficient billing information becomes responsible for intercarrier payments to the receiving provider. Additionally, we expressly permit service providers subject to this charge to pass it along to the service provider that delivered the applicable traffic to them.

340. Another commenter objects to any proposal that "gives . . . [ILECs] the authority to impose new rates based on their own interpretation of the sufficiency of data received or interpretation of jurisdictional parameters."[879] Under our amended rules, service providers will not be able to impose rates based on their own interpretation of the sufficiency of data received. Instead, our amended rules set the standard for what information must be included and passed.

341. We also disagree with commenters who suggest that imposing liability on intermediate service providers implies that the problem is the result of transiting service providers altering call detail information.[880] The financial obligations we impose on intermediate service providers are triggered by passing traffic that does not comply with the call signaling rules, regardless of whether the traffic was originated or altered by the passing service provider. Accordingly, any service provider, not just a provider who stripped or altered traffic signaling, who is not taking steps to ensure that traffic carried on their network is properly labeled and identifiable could be held responsible for payment by the provider to whom it delivered traffic.

342. In addition to call signaling, the USTelecom Feb. 12, 2008 proposal seeks Commission action related to routing traffic, local number portability queries, and providing incumbent LECs with

[876] ARIC Plan at 55.

[877] *See, e.g.*, Letter from Donna Epps, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed July 7, 2007); Letter from Charles W. McKee, Director—Government Affairs, Federal Regulatory, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Apr. 20, 2007) (Sprint Nextel April 20, 2007 *Ex Parte* Letter); Letter from Charon Phillips, Director—Government Affairs, Federal Regulatory, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Mar. 13, 2007).

[878] *See, e.g.*, Verizon *Missoula Phantom Traffic* Reply at 5–6.

[879] *See* Sprint Nextel April 20, 2007 *Ex Parte* Letter at 2.

[880] *See* Missoula Plan Supporters *Missoula Phantom Traffic* Reply at 11–12.

certain rights with regard to the section 251 and 252 negotiation and arbitration processes.[881] Although a broad cross section of the industry supports the USTelecom Feb. 12, 2008 proposal in its entirety, several commenters objected to the section 251 and 252 negotiation and arbitration provisions.[882] In light of the lack of consensus on some of these issues and the changes to the intercarrier compensation system adopted in this order we are not persuaded that the other specific actions sought in the USTelecom Feb 12, 2008 proposal are necessary at this time.[883]

VI. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Universal Service Contributions

343. As we explain above, an assessment methodology based solely on telephone numbers would not require certain business services to equitably contribute to the universal service fund.[884] We, therefore, determine that universal service contributions for business services will be based on connections as opposed to numbers. We seek comment on how best to implement a connection-based mechanism for business services, and whether that mechanism should be based solely on connections or on a combination of Assessable Numbers and connections.

344. We also seek comment on expanding our NRUF data collection to all providers who are required to contribute to the universal service fund based on Assessable Numbers. At present, our NRUF reporting rules require "reporting carriers" to file reports. A "reporting carrier" is defined as "a telecommunications carrier that receives numbering resources from the NANPA, a Pooling Administrator or another telecommunications carrier."[885] "Reporting carriers" file reports regarding six categories of numbers, the descriptions of some of which refer to "telecommunications carriers" or "telecommunications services."[886] We seek comment on whether we should amend our rules to require all providers who assign numbers or otherwise make numbers available to end users to file NRUF reports. Would such an expansion assist the Commission and the fund administrator with monitoring and enforcing universal service contribution requirements? What modifications would the Commission need to make to its rules to effectuate this kind of policy change?

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[881] *See* USTA Feb. 12, 2008 Proposal.

[882] *See, e.g.*, Letter from Brad Mutschelknaus, Counsel to Broadview Networks et al. to Kevin J. Martin et al., FCC, CC Docket No. 01-92 (filed Oct. 22, 2008); Letter from Henry T. Kelly, Counsel to Peerless Networks to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92 et al. (filed Sept. 16, 2008); Letter from Charles W. McKee, Director—Government Affairs, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Apr. 16, 2008); Letter from Thomas Cohen, Edward A. Yorkgitis, Jr., Counsel for NuVox Communications et al., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Mar. 11, 2008); Letter from Daniel L. Brenner, Senior Vice President, Law and Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Feb. 29, 2008); Letter from Paul Garnett, CTIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Feb. 25, 2008).

[883] The USTA Feb 12, 2008 Proposal also sought certain enforcement commitments related to our call signaling rules. In this regard, USTA's proposal did not seek anything beyond the ordinary course of business. As with any of our rules, the Commission is committed to resolving complaints expeditiously and will not hesitate to initiate enforcement proceedings against rule violators.

[884] *See supra* para. 130.

[885] 47 C.F.R. § 52.12(f)(2).

[886] *E.g.*, 47 C.F.R. § 52.12(e)(i) ("*Administrative numbers* are numbers used by telecommunications carriers . . . ."); *id.* § 52.12(e)(v) ("*Intermediate numbers* are numbers that are made available . . . for the purpose of providing telecommunications service . . . .").